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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 59

A. J. SIMLER, *Petitioner*,

v.

LESLIE L. CONNER, *Respondent*.

POST-ARGUMENT BRIEF FOR RESPONDENT

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ment as having been fraudulently induced. It should be noted that Simler's dispute with his attorney did not arise until after the latter had won for his client some $100,000 in cash and a very valuable Oklahoma farm.

There were three distinct "claims." Chronologically, they were:

1. Simler's claim for adjudication of a "reasonable fee" under the July letter-agreement alone.

2. Conner's claim for specific performance of the same "contract," as amplified or liquidated in the fee schedule of the September instrument.

3. Simler's claim for cancellation of the foregoing written instrument of September 25 because his execution of it was alleged to have been fradulently induced.

The federal district court, after ample hearings, granted Conner's motion for summary judgment, thereby enforcing the September 25 instrument and awarding Conner 50% of what he had recovered for Simler, as provided in the fee schedule of that instrument.

I. SUMMARY JUDGMENT WAS PROPER

For the reasons elaborated in his first brief, Respondent contends that summary judgment was altogether fitting and proper because there was no genuine issue of material fact in dispute.[1] The *primary facts*

[1] There was no factual issue over "consideration" below, and Petitioner's suggestions to that effect are quite misleading. No monetary consideration was exchanged for the September instrument, and none was needed. The instrument was, as it purports on its face to be, a mutual liquidation of the previously indeterminate "reasonable fee" provided in the July letter-agreement."

alleged by Simler in support of his plea of fraudulent inducement—such matters as Simler's age, the situs of the execution, Simler's inexperience in litigation and the like—were simply *uncontested* by Conner. As for the more sweeping allegations of ultimate conclusions, *e.g.* "coercion," "fraud," these naturally were inferentially denied, but a dispute over conclusions such as these does not undercut the propriety of summary judgment. The rationale of the trial court's decision evidently began with the implicit premise that such allegations of primary, concrete facts as Simler had made did not, as a matter of law, establish fraud or overreaching by applicable Oklahoma standards of substantive law. On the further question of whether Simler could come forward with legitimate evidence by which to shore up his "conclusions,"—that is to say, whether the whole fraudulent inducement issue, as framed in the pleadings, should be viewed as a sham—the trial court was properly persuaded that it was a sham by the depositions, admissions, affidavits and three exhaustive hearings devoted to the motion.

A trial court's disposition of a summary judgment motion, particularly after the kind of careful treatment afforded it here,[2] should be entitled to considerable weight—at least as much as is usually allowed the court's findings of fact (the "clearly erroneous" doctrine requiring no citation). Although the 10th Circuit has twice reversed this award of summary judgment, it has in neither opinion stated *any reason* for this

[2] In describing the court's treatment of the motion as "careful" or "exhaustive," Respondent does not traffic in hyperbole. The transcript of the three pre-trial conferences following the motion, and devoted mainly to its merits, consumes over 300 pages. See R. at 299-362, 367-512 and 991-1101.

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POST-ARGUMENT BRIEF FOR RESPONDENT

Although already briefed and argued before this Court, a quick recapitulation of this case is probably in order. It began as a declaratory judgment action by Simler, seeking an adjudication of a "reasonable fee" as provided in a July letter-agreement, employing Leslie Conner as Simler's attorney. Conner counterclaimed, setting up a September instrument which purported to liquidate the fees by a definite schedule. The parties agreed that Conner had fully performed, that the ancillary liquidation agreement had been signed by Simler and that it provided in terms a graduated scale of payment pursuant to the contingent-fee contract. The fulcrum of the present dispute was Simler's response to Conner's counterclaim, in which the former sought to set aside the September instru-

ruling. To any fair-minded lawyer who reads the material commencing at pages 109 and 115 of the Record, realizing that it includes everything the 10th Circuit has said on this vital aspect of the instant case, it becomes painfully apparent that the propriety of summary judgment, on the facts and circumstances of this case, has never really been reviewed at all. Summary judgment was simply ruled out *ex cathedra* by the 10th Circuit, in a summary and ineluctable fashion that can scarcely be described as an exercise of reason or judicial review.

For these reasons, Respondent urges again that the trial court's order of summary judgment now be affirmed, without the need for inquiry into the Seventh Amendment issues which this case may raise.

II. THE SEVENTH AMENDMENT WAS NOT VIOLATED

On the other hand, because during oral argument this Court displayed serious interest in these Seventh Amendment issues, Respondent is pleased to avail itself of this additional opportunity for further sharpening and refining its position as to the issues raised by this Amendment.

Since the infancy of our judicial system it has been settled that the jury trial right preserved by the Seventh Amendment is just that which attached to claims at common law on the date of the amendment's ratification. It creates no right for claims which historically were classified as equitable.[3] Thus, characterization is the key to the present dispute.

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[3] This amendment, probably more than any other in the Bill of Rights, is cast in historical terms. As Judge Friendly of the 2nd Circuit has pointed out "... we must turn to history to give it content and meaning ..." *Damsky* v. *Zavatt*, 289 F. 2d 46, 48.

A. All Three Claims Should Be Characterized as "Equitable"

In Respondent's view, all three claims involved in this case are properly regarded as equitable. As to two, indeed, there is apparently no dispute. There is virtually no room for doubt that federal law characterizes as "equitable" both a claim for specific performance of a contract,[4] In re *Canister Co.*, 182 F. 2d 510 (3d Cir. 1950); *Gulbenkian* v. *Gulbenkian*, 147 F. 2d 173 (2d Cir. 1945); *Mahon* v. *Bennett*, 81 F. Supp. 901 (W.D. Mo. 1948); Pomeroy, Equity Jurisprudence (5th ed. 1941) § 1400; 5 Moore, Fed. Practice & Procedure 179, and a claim to cancel a written instrument, *American Life Ins. Co.* v. *Stewart*, 300 U.S. 203 (1936); *State Farm Mut. Auto Ins. Co.* v. *Mossey*, 195 F. 2d 56 (7th Cir. 1952); *Johnson* v. *Gardner*, 179 F. 2d 114 (9th Cir. 1949); *Liberty Mutual Ins. Co.* v. *Gerald*, 170 F. 2d 917 (5th Cir. 1948) 5 Moore, Fed. Practice and Procedure 183; *cf.* also *Beacon Theatres* v. *Westover*, 359 U.S. 500, 515 (dissenting opinion). Nor does it alter the characterization of the latter claim if a litigant alleges that the written instrument should be cancelled because it was fraudulently procured. Just such allegations of fraudulent inducement were involved in *American Life Ins. Co.* v. *Stewart*, *Johnson* v. *Gardner* and *State Farm Mut. Auto Ins. Co.* v. *Mossey*, *supra*. *Cf.* also *Enclow* v. *New York Life Ins. Co.*, 293 U.S. 379; 5 Moore 183 *supra* and cases there cited. The Supreme Court itself has even scrutinized an at-

[4] It is conceivable, inasmuch as his was a contingent-fee contract, that Conner's counterclaim could also be characterized as a claim to establish and enforce an attorney's lien on the proceeds of court judgments obtained through his efforts. Viewed in this light, the claim would also be equitable in character under federal law. See *Ingersoll* v. *Coram*, 211 U.S. 335 (1908); *Taylor* v. *Scarborough*, 66 F. 2d (2d Cir. 1933).

torney-client contingent-fee contract for fraud or overreaching, in a case arising on the equity side of the docket before the Federal Rules were promulgated. *Taylor* v. *Bemiss*, 110 U.S. 42 (1884).

The third claim here to be characterized is that with which Simler opened these proceedings, his claim for an adjudication of what constituted a "reasonable fee." During oral argument Mr. Justice Black observed that Simler's original complaint might be likened to an action for debt, hence legal in character. Regardless of the verbal formulation used, Respondent thinks the claim originally asserted was not within the pale of those assured a right of jury trial by the Seventh Amendment. The reason for its exclusion is the strict historical test mentioned above. As explained in the earlier brief, obligations owed from clients to barristers under employment contracts were not justifiable as of 1791 because not judicially enforceable by the barristers. Such litigation as here involved was then, so to speak, affirmatively barred. Simler's opening claim, therefore, is on a par with actions brought against the sovereign. The latter carry with them no right of jury trial, no matter what the form of action involved, because, most precisely put, a litigant had no standing to bring such actions at common law. The line of Supreme Court cases so holding is perfectly analogous here. Simler's original claim was the sort which enjoyed no jury trial right at common law, and cannot be made to do so now except by a deliberate broadening of the area of jury trial protection afforded by the Seventh Amendment.[5]

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[5] In the relatively few instances where the Supreme Court has decided cases collaterally or implicitly touching jury trial questions in attorney-client contractual disputes, *e.g.*, *Stanton* v. *Enebry*, 93

B. Even if the "Reasonable Fee" Claim Was "Legal," the Result Below Was Proper

Assuming *arguendo* that Respondent's analysis of Simler's opening "reasonable fee" claim is rejected, the trial court decision was nevertheless quite proper. If the reasonable fee claim is deemed "legal," then and only then do we encounter any questions posed by *Beacon* and *Dairy Queen*, since the teaching of these decisions is confined to cases where "legal" and "equitable" claims are joined together. But even they do not require an alteration in the result below.

Once this Court subscribed to the view that no violence was done the Seventh Amendment by a complete emulation in federal courts of the prevailing practice in English courts of law and chancery as of 1791. Thus it said, "[w]here an equitable defense is interposed to a suit at law, the equitable issue raised should first be disposed of as in a court of equity, and then, if an issue at law remains, it is triable to a jury . . ." *Liberty Oil Co.* v. *Condon Nat'l Bank*, 260 U.S. 235, 242 (1922), since this had been the historical order of trial. With *Beacon*, however, the rule as to order of trial changed. Alert to the danger of a litigant's loss of his jury trial right, in light of the modern joinder of "legal" and "equitable" claims into a single form of action, the Court held in *Beacon* that where such legal and equitable claims are joined, requiring selection between a jury and non-jury trial of certain common

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U.S. 548 (1877); *Head* v. *Hargrave*, 105 U.S. 45 (1882), the historical argument based upon the non-enforceability of barristers' contracts at English common law has never been mentioned.

The distinction between solicitors and barristers adverted to in Petitioner's oral argument does not overcome Respondent's argument, it should be noted, since in the instant case Respondent was retained to act as a "barrister," not merely a "solicitor."

issues, the trial court's discretion is "very narrowly limited and must, wherever possible, be exercised to preserve jury trial." 359 U.S. 510

The more recent *Dairy Queen, Inc. v. Wood*, 8 L. ed 2d 44 (1962), though simply an application in a slightly different context of the same *Beacon* doctrine, also made it clear that labels in pleadings cannot control the characterization of litigation for the purpose of applying the doctrine.*

The *Beacon* principle has nothing whatever to do with the instant case. The doctrine, as enunciated in

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* In *Dairy Queen* the plaintiff's complaint alleged breach of a written trademark licensing agreement, followed by plaintiff's cancellation thereof and defendant's continued use of the trademark thereafter. The primary defense asserted to the charge of breach of contract was that the written agreement had been later modified by an oral agreement. Characterizing the original complaint for a money judgment as "wholly legal in its nature," the Court overturned a trial court order striking the defendant's jury demand. It added that the nature of the defense interposed did not transform the "legal" claim into an "equitable" one.

As can readily be seen, *Dairy Queen* has nothing to do with the present questions. It could apply in Simler's favor only if read to mean that the original complaint determines the characterization of a total lawsuit. But this it did not say, otherwise the Court need not even have *considered* the defenses alleged. Even if it were given such a radical interpretation, the fact remains that Simler's original complaint was not, in terms, exclusively confined to a money judgment and Conner's counterclaim prayed expresly for an undivided one-half interest in real property.

Dairy Queen may mean that any given claim for a money judgment is very likely to be characterized as "legal" by the Supreme Court, for the purpose of enforcing Seventh Amendment rights. But this is of no help to Simler's cause here. The most this principle would mean to the instant case is that Simler's original "reasonable fee" claim should be regarded as "legal". It is this premise that Respondent assumes *arguendo* in the textual discussion at pp. 8-10 and, for reasons there noted, it does not require reversal of the trial court's disposition of the issues below.

the two Supreme Court decisions, compels a jury trial of a "legal" claim ahead of an "equitable" one, joined in the same action, only where there are common issues of fact (or mixed fact and law) between the two claims. *See e.g., Thermo Stitch, Inc. v. Chemi-Cord Processing Corp.*, 294 F. 2d 486 (5th Cir. 1961); *Minnesota Mut. Life Ins. Co. v. Brodish*, 200 F. Supp. 777 (E.D. Pa. 1962). The whole thrust of the doctrine, of course, is to insure that a litigant's right of jury trial on his legal claim is not prejudiced by collateral estoppel, resulting from a prior adjudication of a court-triable "equitable" claim. In our case, however, there are no common issues—either of fact, law or mixed fact and law—between the assertedly "legal" claim, for a determination of a "reasonable fee" and the remaining two equitable claims for specific performance and for cancellation of the September 25 written instrument.

What constitutes a "reasonable fee" under the July letter considered alone would appear to be purely a matter of fact, and a question that has nothing whatever to do with the question of whether the September instrument should be set aside for alleged fraudulent inducement. The claim for specific performance and the claim for cancellation are correlatives, of course, both centering on the September instrument. They represent the opposing sides of the same equitable controversy. Between the outcome of this controversy and the determination of a "reasonable fee" under the language of the July letter there is no overlap in fact or law, nor any danger of collateral estoppel.

It is true, on the other hand, that the "reasonable fee" claim is in a sense contingent upon the outcome of the "cancellation" issue. That is, the need for cal-

culating a "reasonable fee" under the terms of the July agreement alone does not arise unless the September instrument is cancelled—otherwise the liquidated fee schedule, like any other unambiguous attorney-client contract, *cf., Carter* v. *Spanos*, 250 F. 2d 814, 816 (8th Cir. 1958); *Gray* v. *Brunetti Const. Co.*, 266 F. 2d 809 (3d Cir. 1959), will set the fee due Respondent. But there is a vast difference between thus making it unnecessary to raise a litigant's "legal" question and actually answering the question—possible to his prejudice—by a court trial. It is the latter hazard, not the former, that the *Beacon* doctrine has been thought to reach. *Cf., Damsky* v. *Zavatt*, 289 F. 2d 56 (3d Cir. 1959).

Precisely because the "reasonable fee" claim is a contingent one, application of the *Beacon* principle to the instant facts makes no sense at all. Determination of a "reasonable fee" is the only issue Simler ever spelled out in his repeated demands for a jury. Assume that the trial judge had submitted this issue to a jury before deciding the equitable question of cancellation. The jury deliberations would have been altogether idle if the court-triable issue of cancellation had later been decided in Respondent's favor. To avoid the danger of such an idle ceremony the trial court should quite properly be allowed to try the cancellation issue *first*, in a case such as this one. Certainly no right of a litigant in Simler's shoes is thereby lost. Assuming that the "reasonable fee" claim is "legal," he may have it tried to a jury *if* the court-triable issue of cancellation is decided in his favor. In our case the latter issue went the other way—a proper decision whose merits are not here under review. Under these circumstances it is literally impossible that Simler can be said to have been dispossessed of any Seventh

Amendment rights, even on the somewhat gratuitous assumption that his original claim should be characterized as legal.

In short, it should now be demonstrably clear that the trial court's decision below cannot be overturned on the strength of the *Beacon* doctrine. Only by advancing beyond the doctrine and engineering fresh principles can this be accomplished. Respondent is far from caviling with the often desirable judicial engineering of novel rules. But there is no need for such advances here. *Beacon* as written is perfectly sound law—and it should remain as written. To go beyond it would come perilously close to a judicial enlargement of the right of jury trial as historically conceived, thus contravening both the statutory policy expressed in the Federal Rule Making Act, 28 U.S.C. 2072, and the Federal rules themselves. Moreover, there is no good reason or policy to justify such an extension of *Beacon*.

CONCLUSION

For the foregoing reasons Respondent respectfully prays that this Court either affirm the Court of Appeals decision below, or else modify it by holding that entry of summary judgment by the trial court was proper.

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